No. 93-1935

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Can an employer sponsor of a welfare plan that has disregarded the statutory mandate of ERISA § 402(b)(3), 29 U.S.C. 1102(b)(3) by failing to provide a procedure for accomplishing a plan amendment or to identify the persons with authority to amend the plan, informally add language purporting to clarify a Summary Plan Description and thereby deprive retired participants of lifetime health benefits under the plan?

Should an employer sponsor of a welfare plan that has implemented an unlawfully adopted amendment to the plan terminating lifetime health benefits to retired participants be required to disregard such amendment and to continue to provide those benefits to the participants until such time as the plan is properly amended?

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BRIEF FOR RESPONDENTS

STATEMENT OF CASE

A. Factual Summary

Beginning in 1966, Curtiss-Wright Corporation ("the petitioner") maintained a plan providing for post-retirement health benefits for retirees from several facilities including its Wood-Ridge, New Jersey facility. As of November 1983, approximately 500 Wood-Ridge participants ("the respondents") were receiving health insurance benefits for themselves and their beneficiaries under that plan. Prior to 1983, no plan provision stated or implied that respondents' retiree

health coverage could be terminated in the event the Wood-Ridge facility closed.

In 1983, the relevant Curtiss-Wright plan documents were the constitution of Curtiss-Wright Employee Benefit Plan dated March 1, 1977, J.A. 34-40, and the 1983 Summary Plan Description, J.A. 43-56. The Constitution provides at Article 6 that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." J.A. 37.[1]

In 1983, as part of a routine redrafting of a Summary Plan Description ("SPD"), a new plan term, written by a draftsman whose identity was never firmly established,[2] was included in the SPD specifically calling for termination of retirees' health benefits if the facility at which the retiree had worked was closed. Petitioner's board of directors never approved or ratified this insertion into the SPD. Pet. App. 8a. There were no formal amendment procedures at all and petitioner failed to follow previously utilized informal procedures for plan amendment. Pet. App. 36a. In successive annual plan returns JA 41-42, 60-61, petitioner denied that any plan amendment had occurred in either 1982 or 1983.[3]

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[1] The Constitution further provides at Article 8(4) that "[i]n the event that any provision of the Plan shall be held invalid or illegal for any reason, such determination shall not affect the remaining provisions of the Plan adopted by the Company or any Trust under a Plan adopted by the Company, but the Plan shall be construed and enforced as if such invalid or illegal provision had never been included." J.A. 39

[2] Two of petitioners mid-level managers actually differed at trial over who had inserted the new plan term into the SPD. J.A. 69-70, 77-78. See note 4, *infra*.

[3] Every employee benefit plan is required to file a Form 5500 with the Internal Revenue Service each year. One of the specific inquiries in that return is whether the plan was amended in the year for which a report is filed. ERISA Section 104, 29 U.S.C Section 1024.

On November 30, 1983, Curtiss-Wright closed its Wood-Ridge facility and terminated the retiree health insurance for respondents. The health plan benefits to retirees from the other Curtiss-Wright facilities continued unchanged.

B. The District Court Decision

On October 4, 1990, after a six day trial, the district court found that the newly added SPD language "constituted an amendment of the plan, not a clarification of existing terms as defendant contends."[4] Pet. App. 36a. The court held that the language inserted into the SPD was not effective to amend the plan because of petitioner's failure to provide for an amendment procedure, as mandated by ERISA § 402(b)(3). *Ibid.* The district court considered the testimony of a single Curtiss-Wright manager that there might "have been an unwritten procedure for amending the plan involving the submission to a certain executive committee. . . ." However, it concluded that "even those procedures were not followed in the case of the 1983 amendatory language." Pet. App. 38a.

The court went on to describe as "completely unpersuasive petitioner's claim that "somehow or other a *de facto* compliance with those unpublished amendment procedures took place because of the membership of that committee and its knowledge of these events. . . ." *Id.*

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[4] The drafters of the SPD revision failed to recognize that the new plan language was in fact an amendment to the plan. Indeed, they steadfastly insisted that the new plan language was a mere "clarification" of the existing plan terms, J.A. 63, 70-71, 79, and therefore they were not concerned about adhering to any amendatory procedures before inserting this language into the SPD.

Petitioner continues to label the distinction between a "clarification" and an "amendment" as "theoretical" and "immaterial". Pet. Br. 14. Petitioner fails to understand that an amendment is a significant change in plan terms that cannot be adopted except through compliance with a stated procedure while a clarification can be accomplished through routine redrafting by minor functionaries.

The court therefore deemed the plan to be in effect without the amendment and held that respondents continued to be eligible for benefits. The district court declined to enter an injunction precluding petitioner from restating the plan to include a formal amendment procedure and from proceeding thereunder to effectuate the plan amendment it had unsuccessfully sought to apply to respondents in 1983. Pet. App. 40a. Petitioner in November 1990 through formal action of its board of directors amended its plan to effectively terminate respondents benefits.

C. The Third Circuit Decision

The Third Circuit handed down its initial ruling on December 28, 1993. On March 3, 1994, the Third Circuit vacated its December 28, 1993 opinion and filed a substitute opinion. Pet. App. 1a. On March 14, 1994, the court denied petitioner's petition for rehearing. Pet. App. 109a.

The March 3, 1994 decision rejected petitioner's arguments that its plan contained an amendment procedure complying with Section 402(b)(3) and that no substantive remedy was warranted if Section 402(b)(3) had been violated. The Third Circuit concluded that petitioner's plan amendment language was insufficient because "[a] simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan'; nor does it provide a procedure 'identifying the persons who have authority to amend the plan.' " Pet. App. 7a-8a. The court went on to hold that petitioner's interpretation of Section 402 (b)(3) would render the statute meaningless.

The court rejected the argument that incorporation of new language into the SPD by the petitioner rendered moot any discussion of the means by which the alleged amendment had been adopted. The court held that a written incorporation of new plan terms into pre-existing plan documents and a clear intent to amend are necessary but not sufficient to accomplish an effective plan amendment. Compliance with published

amendment procedures is also required, in order to allow employees to understand not only their present benefits, but how their rights may be modified in the future. *Id.* at n.4.

Recognizing that ERISA's basic tenets require that a plan be established and maintained pursuant to a written instrument available on request to plan participants, the court held that "[u]nless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan." Pet. App. 10a. The Third Circuit concluded that a rule invalidating improperly adopted putative plan amendments was necessary to "assure the integrity" of plan documents. Pet. App. 11a.

The Third Circuit explicitly rejected petitioner's contention that the failure to provide and follow an amendment procedure was a "procedural" violation which did not create substantive rights. The court held that compliance with appropriate amendment procedures was a "far more fundamental" concern than a failure to comply with ERISA'S reporting or disclosure requirements, because the amendment procedures safeguard the basic integrity of the plan document. Pet. App. 10a.

The Third Circuit enunciated a rule that "best served" the Congressional scheme embodied in ERISA by allowing plan sponsors whose plans fail to satisfy Section 402(b)(3) to restate the plan "by formal action of those who possess the sponsor's final management authority" to include an amendment procedure. Pet. App. 11a.

A footnote to the majority opinion stated Judge Roth's concurring view that the phrase "by the Company" in the Curtiss-Wright plan provision reserving the right to amend the plan must, at a minimum, require that action be taken by petitioner's board of directors pursuant to the applicable state corporate law. In her view the "amendment in question here was ineffective because neither [Curtiss-Wright's] board nor

any other person or entity within [Curtiss-Wright] with the power to act on behalf of 'the Company' ratified it." Pet. App. 8a-9a n. 3.

D. The Petition for Certiorari

On September 26, 1994, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit was granted.

SUMMARY OF ARGUMENT

1. Since the district court held that petitioner made no effort to accomplish a valid plan amendment and since petitioner denied, until the district court's decision, that an amendment had even been attempted, the result below must be affirmed under any reasonable interpretation of Section 402(b)(3).

2. Section 402(b)(3) requires that every plan identify the person with the authority to amend the plan and the procedure to be utilized in accomplishing the amendment. Even if naming the "Company" in the bare reservation of rights language adopted by petitioner is deemed to satisfy the statutory requirement that the individual with the power to amend be identified, the second requirement that a procedure be set forth has not been met. The Third Circuit's finding that the reservation of rights language does not satisfy the requirements of Section 402(b)(3) follows the plain meaning of the statute.

3. Both Judge Roth and the Solicitor General suggest that, in some instances, an amendment procedure could be read into a plan by incorporating procedures in other plan documents or by incorporating by reference applicable statutory provisions. Were this Court to accept that approach, it would protect many plan amendments, although not the one attempted by petitioner, which was never intended to accom-

plish more than a language clarification and did not even follow the minimal, previously-utilized, informal amendment procedures.

4. A plan amendment adopted in violation of a specified amendment procedure is clearly invalid. Similarly, plan amendments adopted in violation of an incorporated or implied amendment procedure or in the absence of any amendment procedure are also invalid. It is appropriate to enforce the terms of a plan without giving effect to an invalid amendment, the relief granted by the Third Circuit. Otherwise, employers and plan sponsors who comply with the law by providing a procedure for amending their plans will be disadvantaged in that their burden will be heavier than that of sponsors who have not complied.

5. To justify a reversal of the result below the Court would have to accept petitioner's argument that because it would have terminated retiree health coverage in any event, requiring it to obey the law would be pointless. That cynical "no harm no foul" approach would effectively read Section 402(b)(3) out of ERISA. Furthermore, this interpretation rests on the erroneous assumption that petitioner's failure to include and follow a stated procedure for amending its plan did not harm respondents.

6. In fact, respondents suffered serious harm by the deprivation of their right to have this critical amendment terminating their lifetime retirement health care benefits made by a designated authority cognizant that a substantive change in plan terms and not a mere clarification was being made. Respondents were also deprived of a record of the amendment and were forced to spend seven years in litigation to prove an amendment had occurred. This exercise disadvantaged the court as well as respondents.

7. Congress did not intend that the common law of trusts govern all aspects of the operation of employee benefit plans when it enacted ERISA. The decision in *Biggers* v. *Whittek*

Industries, Inc., 4 F.3d 291 (4th Cir. 1993), should not be followed to the extent it advocates automatic application of common law trust principles to ERISA plans.

8. A requirement that plans comply with the plain language of the statute will not lead to the flood of litigation predicted by petitioner and the amici because plan amendments of the magnitude of the one at issue here are seldom attempted through casual redrafting rather than formal acts by the plan sponsor's highest authority.

ARGUMENT

I. PETITIONER'S AMENDMENT OF THE SPD WAS NOT EFFECTIVELY ADOPTED UNDER ANY REASONABLE INTERPRETATION OF SECTION 402 (b)(3)

Section 402(b)(3) commands that every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). Petitioner's plan merely stated that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." J.A. 37. When petitioner altered the SPD to provide for the termination of retiree health insurance benefits upon the closure of the Wood-Ridge facility, it added a plan term that could only be included by lawful amendment. The question presented by this case is whether that amendment was properly adopted and therefore effective.

The court below presents two interpretive approaches to Section 402(b)(3). First, there is that of the Third Circuit opinion, which requires that an amendment procedure be found within the plan documents. Second, there is the interpretation urged by Judge Roth (and proposed in the Solicitor General's brief) which would permit an amendment procedure

to be imputed from outside the four corners of the plan by the application of state or federal law. In contrast, the position proffered by Petitioner is that a plan need not have or follow any amendment procedure at all.

It is submitted that this Court's analysis of these competing interpretations must consider four factors, three enunciated by the Third Circuit to support its statutory reading and one posited by petitioner and the amici. These are (1) the neutral principles of statutory construction and the plain language of the statute, (2) the statutory purpose of achieving certainty with respect to applicable plan terms, (3) the avoidance of the perverse result that plans which comply with the letter of the law are worse off than those which do not, and (4) the balancing of the interests of the participants protected by Section 402 (b)(3) against the costs of compliance to plan sponsors.

The Third Circuit held that neither petitioner's board of directors nor any other person or entity within Curtiss-Wright with the power to act on behalf of "the Company" ratified the 1983 amendment to the SPD. Pet. App. 8a. The district court found that neither formal nor informal procedures were followed in 1983 by petitioner in connection with the new plan terms. Pet. App. 38a. Respondents submit that ERISA contemplates a modicum of procedural formality before stripping retirees of the lifetime health benefits they had been promised.[5]

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[5] Petitioner disingenuously persists in its claim that an "unwritten practice" had been followed in this case because the amendment had been promulgated by the legal department and executive committee members. Pet. Br. 13. However, the record reflects that Richard A. DuBois, the sole witness on this point, testified that if the so-called informal executive committee had in fact accomplished a plan amendment, its decisions would have been reflected in meeting minutes or a memorandum, and that no such committee action ever occurred. J.A. 73-74. The testimony showed and the district court found that, not only was no formal amendment procedure followed by petitioner, but also that an unwritten procedure calling for review by a so-called executive committee was not followed.

The only interpretation of Section 402(b)(3) which would not result in the invalidation of petitioner's amendment would, by necessity, read the requirements of that section out of the statute by holding that a plan need not have an amendment procedure. Petitioner argues that the statute doesn't compel any particular procedure and that its general reservation of a right to amend is itself a procedure.[6] Petitioner's interpretation, if adopted by this Court, would effectively amend the statute in question to read "[e]very employee benefit plan shall state whether the sponsor reserves a power to amend". That could have been the language adopted by Congress—but it was not; Congress plainly chose to impose a heavier and a more specific burden upon plan sponsors.

A. The Third Circuit's Opinion is Supported by the Plain Language of the Statute and by Neutral Principles of Statutory Construction

Any analysis of Section 402(b)(3) should "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly Inc.* v. *Dollar Park & Fly Inc.*, 469 U.S. 189, 194 (1985); *accord Connecticut National Bank* v. *Germain*, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990). The clarity and precision of Section 402(b)(3) casts onto petitioner the "exceptionally heavy burden of persuading [the Court] that Congress intended to limit" the statute's clear language. *Patterson* v. *Shumate*, 112 S.Ct. 2242, 2248, 119 L.Ed.2d 519

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[6] The Solicitor General makes a similar, but more limited argument in analogizing employee benefit plans to the United States Constitution and arguing that all the plan is meant to do is provide the framework upon which provisions, including an amendment process, are to be grafted. That analogy is misplaced since ERISA, in contrast to the Constitution, is a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 361, *reh'g denied*, 448 U.S. 908 (1980). The Constitution is also distinguishable in that it includes a very specific amendment procedure.

(1992), *quoting Union Bank* v. *Wolas*, 112 S.Ct. 527, 530, 116 L.Ed.2d 514 (1991).

The structure of Section 402 reflects a strong Congressional determination to achieve adherence to the requirements of Section 402(b)(3).[7] The hierarchy of priorities of Section 402 is shown by its division into Subsection 402(b) and 402(c), the plan features of the former being "requisite" and those of the latter being "optional". Section 402 (b) itself has differentiated priorities among its mandated features. For example, Section 402(b)(2) requires that a plan "describe" any procedure under the plan for allocating responsibility for certain acts among the trustees, thereby making plain that the existence of such a procedure is discretionary.[8] By contrast, the

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[7] ERISA's Congressional findings and declaration of policy at 29 U.S.C. 1001(a) provides that "it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made *and safeguards be provided with respect to the establishment, operation, and administration of such plans.*" The declaration of policy further states that it is in the interests of employees and their beneficiaries *"that minimum standards be provided assuring the equitable character of such plans"*. The statute provides at 29 U.S.C. 1001(b) that "[i]t is hereby declared to be the policy of this Act to protect . . . the interests of participants . . . *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.*" It is clear that Congress regarded its standards for the administration of employee benefit plans to be central to the Act.

[8] Sections 402(b)(1) and (b)(3) have a similarly phrased requirement of a procedure, except that Section 402(b)(1)'s demand that a plan specify a procedure for establishing and carrying out a funding policy is applicable only to funded plans. D.O.L. Reg. 2509.75-5, 29 C.F.R. 2509.75-5 (FR-5) (ERISA Interpretive Bulletin 75-5). It is instructive however to consider the procedure that the U.S. Department of Labor (DOL) authorized in its 1975 regulations for compliance with 402(b)(1) to flesh out the procedural specificity that should be required to satisfy Section 402(b)(3). The DOL described an acceptable procedure under Section 402(b)(1) that "the plan's trustee shall, at a meeting duly called for the purpose, establish a funding policy and method which satisfies the requirements of . . . the Act and shall meet annually at a stated time of the year to review such funding policy and method." 29 C.F.R. 2509-75-5 (FR-4). It is very difficult to square this attention to procedural detail

language petitioner seeks to dilute is expressly designated a mandatory plan feature as no suggestion of discretion appears in the language of Section 402(b)(3).

Petitioner also contends that it adequately identified the "persons who have authority to amend the plan" by its reference to "the Company." ERISA defines the term "person" as including corporations and other entities that could be plan sponsors. 29 U.S.C. 1002(9). It is not, however, the identity of a particular person that Congress sought but a "procedure . . . for identifying the persons who have authority to amend the plan."[9] It is far more consistent with the thrust of the entire section to require that, for the benefit of participants, sponsors identify the level in the organization at which amendments can be effectively promulgated.[10]

B. The Third Circuit's Opinion Serves the Primary Purpose of Section 402(b)(3) by Assuring That Participants, Fiduciaries, Sponsors and Reviewing Courts Can Determine the Content of the Plan's Effective Written Instrument.

Petitioner acknowledges that Section 402(b)(3) requires that each plan amendment be set forth in a written instrument but asks the Court to limit the purport of the statute to "promoting the identification of amendments not yet incorporated in the plan documents". Pet. Br. 17-18. This limited view rests entirely on petitioner's notion that an amendment's

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for implementing a parallel statutory requirement of the statute with the Solicitor General's view in this case.

[9] In Judge Roth's view, that identification can be imputed by reference to the law of the state of incorporation of the Company. See Point II, *infra*.

[10] See *Musto* v. *American General Corp.*, 861 F.2d 897, 902 (6th Cir. 1988) *cert. den.*, 490 U.S. 1020 (1989), in which the ERISA plan provided that "[o]nly the President, a Vice President, the Secretary or an Assistant Secretary has power on behalf of the Company to make or modify this contract of insurance."

mode of adoption becomes irrelevant once the new language appears in a plan document. This contention—and the reasoning flowing from it—overlook the definitive role of Section 402(b)(3) in carrying out ERISA's requirement that each benefit plan be maintained pursuant to a written instrument. See Section 402(a)(1), 29 U.S.C. § 1102(a)(1). Fiduciaries are required to discharge their "duties with respect to a plan solely in the interests of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this Title or Title IV." 29 U.S.C. § 1104(a)(1)(D). Fiduciaries are required to adhere to plan documents only insofar as such documents are consistent with Title I; they must be able to ascertain whether putative amendments are part of the "documents and instruments governing the plan" and, if so, when such amendments became effective. Obviously documents containing newly added plan terms that have not been adopted in accordance with Section 402(b)(3) can not be deemed "consistent" with Title I.

The Third Circuit held that Section 402(b)(3) was enacted to permit all interested parties—participants, plan sponsors and reviewing courts—to know how a plan may be altered and who may make such alterations. As the Third Circuit observed, "[o]nly if [participants] know this information will they be able to determine with certainty at any given time exactly what the plan provides." Pet. App. 8a. Employee benefit plans are a multi-billion dollar component of the United States economy which provide important benefits to millions of employees. Congress was presumably concerned that an identifiable procedure exist for determining precisely when and by whom any alterations in those plans had been or could be accomplished.[11]

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[11] The Solicitor General argues that Congress was concerned only that each plan be able to effectuate amendments. If that were Congress' only concern, it would have adopted unchanged the original version of H.R. 2 which deemed Plan Administrators to be able to amend plans without reference to any procedure. See, note 21, *infra*.

The decision below is an important aid for reviewing courts in ascertaining when, under what circumstances and by whose authority critical plan terms have been changed. It is needlessly difficult to review these matters in the absence of an identified procedure which properly frames and dates disputed terms.

C. The Third Circuit's Opinion Avoids an Absurd Result

The interpretation urged by petitioner leads to the absurd result that plan sponsors who comply with the plain language of Section 402(b)(3) would be worse off than those who ignore it. Every court which has considered the matter has concluded that a plan sponsor who adopts amendment procedures is required to follow them to achieve an effective amendment. *See Hozier* v. *Midwest Fastener, Inc.*, 908 F.2d 1155 (3d Cir. 1990); *Frank* v. *Colt Industries, Inc.*, 910 F.2d 90 (3rd Cir. 1990), *reh'g denied*; *Albedyell* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991). Petitioner's interpretation of the statute would allow plan sponsors, who do no more than reserve the right to amend, to effectuate a plan amendment without following a plan procedure merely by including new language in a summary plan description. On the other hand, plan sponsors who comply with the statute by adopting amendment procedures are required to abide by those procedures. Congress, of course, did not intend to place those who violate Section 402(b)(3) in a better position than those who comply.

D. Preservation of the Status Quo Cannot Justify Ignoring the Clear Statutory Requirements Upheld by the Third Circuit Opinion

Petitioner makes much of the similarity between a bare bones reservation of a right to amend in its plan document and the general language included in an Internal Revenue Service ("IRS") master and prototype plan publicized by a commercial pension service. *2 Pension Coordinator* para. 13,

181 at 13, 276 R - 124 (RIA 1994). There is absolutely no suggestion that by creating this sample plan, the IRS intended, or was empowered to issue an authoritative interpretation of Section 402(b)(3). Respondents join the Solicitor General's observation that the prototype language is owed no heightened deference as a legal matter because the IRS has no interpretative or enforcement authority with respect to matters arising under Section 402 of the Act. Prior to the submission of the Solicitor General's brief, the cognizant agency, the Department of Labor, had not issued any interpretative guidance respecting 402(b)(3). An agency view first precisely expressed in a brief to this Court should not be accorded the deference due a settled and long-standing administrative interpretation.[12] *See Estate of Cawort* v. *Nicklos Drilling*, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993).

The petitioner and amici rely less upon the authoritative effect of the IRS prototype language than on the *in terrorem* argument that ERISA plans throughout the nation that have adopted such language will be disrupted if the decision of the Court below were upheld. Despite the fears expressed by petitioner and its amici that plans have relied upon general reservation of rights language to accomplish plan amendments through casual redrafting of plan documents, the case law suggests that ERISA plans are routinely amended by actions of corporate boards of directors.[13] See, Pension and Profit

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[12] In this respect the Department of Labor's view in 1975, virtually at the time of the adoption of ERISA, on the procedural detail necessary to satisfy Section 402(b)(1) is far more probative of the statute's intent than the pallid version offered today by the Solicitor General. See note 8, *supra*

[13] *See, Elmore* v. *Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Law* v. *Ernst & Young*, 956 F.2d 364, n.9 (1st Cir. 1992); *McDonald* v. *Pan American World Airways, Inc.*, 859 F.2d 742 (9th Cir. 1988) (dissenting opinion); *In re Graham*, 726 F.2d 1268 (8th Cir. 1984); *Kuper* v. *Quantum Chemical Corp.*, 852 F.Supp. 1389 (S.D. Ohio 1994); *Farr*

Sharing 2d, Vol. 5, Sec. ERISA 402-4.01 (Maxwell MacMillan, 1991), a widely accepted general reference work, which states that "[m]any plans reserve the right to amend to the sponsor, to be exercised by its board of directors or authorized corporate officers. Persons authorized to amend the plan should be identified in the plan document by name or by office."

Congress considered the cost and burden of compliance with its plain language when it adopted Section 402(b)(3).[14] Petitioner suggests a new and extraordinary principle of statutory interpretation that could eviscerate ERISA and affect a wide range of statutes, i.e., that employers subject to ERISA can free themselves of unwanted administrative burden by determined non-compliance.[15] If that were the case, why

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v. *U.S. West, Inc.*, 815 F. Supp. 1364 (D. Or. 1992); *Pane* v. *RCA*, 868 F.2d 631, 634 (3rd Cir. 1989); *Nachwalter* v. *Christie*, 611 F.Supp. 655, 663 (S.D. Fla, 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986). Indeed, petitioner included such a detailed procedure in its Trust Agreement, which provides, at Article XII that "the Company reserves the right at any time and from time to time by action of its Board of Directors to amend, in whole or in part any or all of the provisions of this Agreement . . .". J.A. 30.

[14] The 1974 House Report accompanying HR 2 concluded that "the relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analyzed on the base of their projected costs in relation to the anticipated benefit to the employee participant." House Rep. 93-533, 1974 U.S.C.C.A. 4639. Although this particular language appears to predate the specific adoption of Section 402(b)(3), the observation that Congress conducted a cost/benefit analysis before adopting these plan design requirements continues to be true.

[15] The Fifth Circuit made a similar point in ruling that ambiguities in an SPD must be resolved against the drafter. In *Hansen* v. *Continental Insurance Co.*, 940 F.2d 971, 981-982 (5th Cir. 1991) the court held that "any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden and not on the individual employee

would any plan sponsor adhere to ERISA's other mandated plan design features? Why place plan assets in a trust or create a written plan?

This Court has previously rejected arguments by litigants and the Solicitor General that an alleged potential for disruption is a dispositive factor in statutory interpretation and it should reject that argument here. *See e.g. John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993). In any event, if relief from the enforcement of Section 402(b)(3) as written is beneficial or advisable, it should be provided by Congress and not the Court.[16]

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who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document." The court concluded by observing that "[a]ccuracy is not a lot to ask . . . especially not a lot to ask in return for the protection afforded by ERISA's preemption of state law causes of action" Id. Respondents contend any burden of observing statutory procedures in amending the plan should be placed on the plan sponsor who has a unilateral ability to comply and is best able to bear any burden arising from its failure to adhere to the statute.

[16] Should an affirmance of the Third Circuit actually result in the torrent of litigation predicted by petitioner and amici, Congress could enact a new jurisdictional rule to deal with the situation. See, e.g., Portal to Portal Act of 1947, 61 Stat 84 as amended, 29 U.S.C. §§ 251-264. *Landsgraf* v. *USI Film Products*, 511 U.S. ___, 128 L.Ed.2d 229, 266 (1994) (Scalia, J., concurring); *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717 (1984); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952); Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation", 73 Harv. L. Rev. 692 (1960).

II. THE INTERPRETATION OF SECTION 402(b)(3) OF JUDGE ROTH AND THE SOLICITOR GENERAL RECOGNIZES AN IMPUTED AMENDMENT PROCEDURE WHICH PETITIONER DID NOT SATISFY

In the opinion of the Third Circuit it is noted that Judge Roth would rely upon the application of Delaware Corporation Law to determine the procedure that Curtiss-Wright had to follow in order to amend the plan:

> Even if we were willing to equate "by the Company" with "by the board of directors," the record here does not indicate that the 1983 amendment was adopted by CW's board. While Judge Roth agrees with our conclusion that the amendment to the plan was ineffective, she does not agree with our reasoning on this point. Instead, Judge Roth believes that action taken by "the Company" means action taken by the board of directors or whomever of the company has the authority to take such action under the corporation law of the state of incorporation of the company in question. As CW is a Delaware corporation, Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a). . . . Thus the amendment in question here was ineffective because neither CW's board nor any other person or entity within CW with the power to act on behalf of "the Company" ratified it. Pet. App. 8a-9a, n.3.

The Solicitor General's brief advocates a similar approach.

The position advocated by the Solicitor General and taken by Judge Roth would establish a default rule deeming that a reference to the "company" means action by its highest decision maker—in the case of petitioner, its corporate board of directors. Where a plan fails to comply with the plain meaning of Section 402(b)(3) because it does not provide an amendment procedure, a statutory violation will be avoided if an amendment procedure can be incorporated from applicable

state or federal law. Judge Roth's approach is in accord with the decision in *Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993), to the extent that the *Huber* amendment procedure was incorporated by reference to the provisions of the Labor Management Relations Act, rather than by reference to accompanying trust documents.

Nevertheless, Judge Roth's approach cannot be reconciled with the statute's plain language as the imputed amendment procedure is not to be found within any plan document. It would require a sophisticated reader of plan documents to recognize that an amendment procedure could be imported from a state or federal statute and, in that sense, the plan documents could not be read with the certainty that would be provided under the Third Circuit interpretation.

Of course, Judge Roth's approach has many of the Third Circuit decision's analytical strengths. By incorporating or implying a lawfully mandated amendment procedure for plans that neglected to provide one for themselves, those who conscientiously comply with the law will not be thereby disadvantaged since the non-complying plan sponsors will nevertheless be required to follow a legally mandated procedure. Indeed, plan sponsors who comply with ERISA may be advantaged since they will have designed their own amendment processes which they consider less burdensome than those otherwise imposed by law.

Judge Roth's approach also defuses petitioner's arguments about the dangers of disturbing the status quo by undermining countless plan amendments. Many plan sponsors who may have chosen reservation of rights language similar to petitioner's will have amended their plans through actions of their corporate boards of directors or other legally mandated authority. Adopting Judge Roth's view would mitigate the litigation explosion predicted by petitioner and amici while still

remaining true to the statute's essential purpose of insuring certainty in the ascertainment of plan terms.

Should this Court choose the approach enunciated by Judge Roth and supported by the Solicitor General, the decision below must be affirmed, since the district court found that petitioner's board of directors neither adopted nor ratified the amendment in question.

III: THE THIRD CIRCUIT PROPERLY ENFORCED PETITIONER'S PLAN WITHOUT THE PLAN AMENDMENT THAT FAILED TO COMPLY WITH SECTION 402(b)(3)

The appropriate remedy for failure to properly amend a plan is to require the plan to continue as it was prior to the failed amendment. The Curtiss-Wright Plan Constitution includes a savings clause (Article 8, Section 4) providing that if any plan term was legally ineffective, the plan would be construed without reference to that term. J.A. 39. Accordingly, enforcing the plan as written and disregarding a legally ineffective amendment was exactly what the plan sponsor intended.

As the Third Circuit noted:

> There is something at stake here far more fundamental than a failure to comply with ERISA's procedural requirements pertaining to reporting and notice. The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter, the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the

> plan administrator or a court is free to deviate from the terms of the original plan. . . .
>
> Unlike the situation in *Hozier*[17] where the Plaintiffs sought benefits not provided for in the plan, the Plaintiffs' right to benefits in this case is derived exclusively from the terms of the plan; all the district court did was enforce the plan as written. Pet. App. 10a.

Respondents do not seek to recover some benefit which was promised to them but never provided for in any plan document. In this case, the appropriate remedy is that granted by the Third Circuit, i.e., to continue the benefits that the plan provided without the invalidated amendment.

A. A Participant Need not Demonstrate Prejudice or Detrimental Reliance to Enforce a Plan's Written Terms

Citing *Adams* v. *Avondale Industries Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), petitioner argues that no "substantive remedy of prohibiting plan amendment" for Section 402(b)(3) violations is appropriate unless detrimental reliance is established. This argument grafts onto Section 402(b)(3) a condition that a number of courts have imposed in cases alleging violation of reporting and disclosure requirements. *See, e.g.*, *Gavonis* v. *Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252-53 (1st Cir. 1984); *Lewandowski* v. *Occidental Chemical Corp.*, 986 F.2d 1006, 1008-10 (6th Cir. 1993); *Kreutzer* v. *A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied* 474 U.S. 865 (1985).

These reporting and disclosure cases address not the terms of the plan but the manner in which the plan was or was not communicated to participants. They do not address fiduciary

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[17] *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155 (3rd Cir. 1990)

obligations under Section 402(b)(3) and other core fiduciary obligations.[18] It would be unprecedented for this Court to rule that a fiduciary breach under ERISA is without effective remedy. It is consistent with the basic thrust of ERISA to hold that the terms of a plan are not invalidated by a failure to abide by reporting and disclosure requirements, but the same concern for the integrity of plan terms precludes recognition of amendments which are not adopted in compliance with Section 402(b)(3). Resort to theories of detrimental reliance or prejudice is unnecessary when participants seek to enforce only the lawfully adopted terms of the plan.

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[18] ERISA's reporting and disclosure sections are separate from the fiduciary obligations sections. The statute sets forth its reporting and disclosure obligations for both pension and welfare plans at Title I, Subtitle B, Part 1. The statutory terms intended to ensure the equitable character of benefit plans by establishing standards of conduct, responsibility and obligations for fiduciaries of employee benefit plans are set forth in Title I, Subtitle B, Part 4. Part 4 separately sets forth bedrock sponsor and fiduciary obligations that Congress presumed would be at the core of every benefit plan.

The distinction between the reporting and disclosure cases under Part 1 of Title I and the instant case under Part 4 of Title I is sharply drawn by the fact that Congress did not require that a plan's amendment procedure be included in the plan features described in an SPD. See Sec. 102, 29 U.S.C. 1022; DOL Reg. 2520.102-3, 29 CFR 2520.102-3. The information required to be reported assumes compliance with mandatory plan design requirements. Similarly, the SPD is not required to report to participants that plan assets are being held in trust or that the fiduciaries are bound by the prudent person rule.

Curtiss-Wright as plan sponsor had a fiduciary obligation under Section 404(a)(1)(D) to ensure that its plan incorporated mandatory plan design features of Part 4, Title I of ERISA. *Batchelor* v. *Oak Hill Medical Group*, 870 F.2d 1446, 1449 (9th Cir. 1989) (Third party responsible for establishing pension fund had fiduciary duty regarding selection and retention of fund administrator); *Gelardi* v. *Pertic Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir., 1985) (corporation had fiduciary duty and could be liable with respect to selection of plan administrator.)

B. Respondents Were Harmed by Petitioner's Violation of Section 402(b)(3)

Although detrimental reliance need not be shown, petitioner's failure to maintain its plan in accordance with Section 402(b)(3) has, in fact, harmed the participants. As the Third Circuit noted, the lack of an amendment procedure deprived the participants of the ability to know at any given time with certainty what the plan provided and how the plan terms could be modified in the future, in effect due process rights with real meaning for participants. But they are not the only harms suffered by the participants. Respondents were specifically deprived of their right to have a critical amendment to their lifetime retiree health care benefits made by a designated authority cognizant that an amendment—i.e., a substantive change and not a mere clarification of a pre-existing plan term—was being accomplished. It is worth noting that petitioner promised orally and in writing on hundreds of occasions over several decades that these benefits would continue for life. In that context, it should not be presumed that a responsible designated amending authority would rubber stamp the personnel department's knee-jerk reaction to the decision in *United Auto Workers* v. *Yardman*, ___ F.Supp. ___ (E.D.MI 1981), *affirmed in part, reversed in part and remanded*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), which recognized the rights of retirees to continuing health insurance coverage. Respondents were deprived of their right to an orderly amendment procedure in which all factors could have been weighed.

Moreover, these participants, the plan fiduciaries and this Court have been deprived of a record which would establish (1) that an amendment was promulgated, (2) the effective date of the amendment and (3) the actual decision maker. It took these participants seven years of litigation to ascertain that an amendment had been attempted. This is an unacceptable burden to place upon plan participants. The lack of an

amendment procedure contemplated by Section 402(b)(3) led directly to this harm.

C. The Common Law of Trusts Does Not Authorize Amendment by Manifestation of a Settlor's Intent Outside of Section 402(b)(3)

Petitioner relies upon common law trust principles to argue that a settlor may exercise a reserved power to modify or revoke a trust in any manner which sufficiently manifests his intention to modify where no method for amendment is specified. *See Biggers* v. *Wittek Industries Inc.*, 4 F.3d 291 (4th Cir. 1993); *Restatement (Second) of Trusts*, Section 331, Comment C. Petitioner relies on the *Biggers* decision for its argument that, as a trust settlor, it has sufficiently manifested its intention to modify the plan, although no method for amendment is specified. In *Biggers*, the Fourth Circuit held that "because the power to revoke or amend an employee welfare benefit plan is inherently reserved to the employer under ERISA, an employer who fails to include procedures in its plan for amendment is in the same position as the settlor who has reserved the power to amend but not provided a method for exercising it." 4 F.3d at 295.[19] Concluding that "in the

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[19] *Biggers* ignores Congress' decision to draw selectively from, but not to adopt in its entirety the common law of trusts. The affirmative requirement that every plan set forth an amendment process marks one area in which Congress opted not to adopt the common law of trusts. Under the common law, a trust instrument is not required to have an amendment procedure. The common law of inter vivos trusts did not require a writing at all and, to the extent a Memorandum existed, required only that it set forth "with reasonable definiteness the trust property, the beneficiaries and the purposes of the trust." *Restatement (Second) of Trusts*, Section 46; *see also Restatement (Second) of Trusts*, Section 39. However, the common law solution focusing on whether there is conduct which manifests the settlor's intention to modify the trust simply cannot be applied where Congress has chosen to reject the underlying common law trust principle.

Congress intended by its enactment of ERISA to adopt "*certain* principles developed in the evolution of the law trusts." *Firestone Tire &*

absence of provisions in a plan that provide procedures for amendment, a writing amends a plan only when accompanied by a clear manifestation of an intent to alter the policy or plan", (4 F.3d at 296), the court found that there was no "clear manifestation" of intent in the actions of the employer's corporate officers.[20]

ERISA's legislative history repeatedly demonstrates that Congress chose to reject certain common law trust fiduciary standards it considered insufficient to safeguard the rights of participants in employee benefit plans. H.R. Rep. No. 93-533 stated that

> reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and *inter viva* trusts . . . with an attendant emphasis on carrying out the instructions of the settlor . . . The typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature . . . , 1974, *U.S. Cong. & Administrative News*, p. 4650.

The House Report further confirms that the fiduciary sections of the bill "incorporate the core of principles of fiduciary con-

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Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), *quoting* H.R. Rep. No. 93-533, pl. 11 (1973), 93rd Congress Second Session 2, *reprinted in*, 1974 *U.S. Code Cong & Administrative News*, 4639, 4649. Congress did not adopt in ERISA the "entire body of state trust law lock, stock and barrel" but drew selectively from the common law. *Nieto v. Ecker*, 845 F.2d 868, 872 n. 2 (9th Cir. 1988). Congress intended to and did adopt principles of fiduciary conduct "but with the benefit of modifications appropriate for employee benefit plans". H.R. Rep. No. 93-533, 93rd Cong. Second Sess., *reprinted in* 1974 *U.S. Code Cong. & Administrative News*, 4639.

[20] Petitioner's actions cannot satisfy this forgiving *Biggers* standard, since it consistently denied that it had amended the plan, from the time of the purported amendment to the trial of this case, and cannot now contend that it intended to amend the plan.

duct as adopted from existing trust law but with modification appropriate for employer benefit plans".[21] *Ibid.*

When called upon to interpret ERISA federal courts have acknowledged that Congress drew selectively from the law of trusts. For example, in *Useden* v. *Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *cert. denied* 113 S.Ct. 2927, 124 L.Ed.2d 678 (1993), the Eleventh Circuit interpreted ERISA as embodying "a tailored law of trusts—a legal fabric which not only adopts familiar trust principles but also supplements these principles with more exacting standards." The Eleventh Circuit cautioned against an "unselective incorporation of trust law rules into ERISA" in favor of an approach which would "only incorporate [into ERISA] a given trust law principle if the statute's text negates an inference that the prin-

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[21] ERISA's legislative history showing that Congress rejected the pre-existing common law regarding trust amendments is exceptionally clear. The version of HR 2 reported out of Committee followed pre-ERISA common law by requiring only that a plan "identify and appoint an administrator . . . who shall . . . have full authority for the operation of such employee benefit plan including the authority to . . . amend such plan." H.R.2, 93rd Cong., 1st Sess. § 111(a)(1) (1973). The *Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reforms*, 93rd Cong. 2d Sess. Pt 3 at 12 (Comm. Print June 12, 1974) characterized the House version as deeming plan administrators "to have full authority and responsibility to operate the plan, including the authority to amend the plan." The Senate version of H.R.2 had no comparable provision. The actual statutory language adopted in Section 402(b)(3) rejects any implication that the plan administrator (or sponsor) have an implied authority to effectuate plan amendments. The Summary of Differences report to the House and Senate Conferees commented that "The conferees may wish to provide that each pension plan is to provide a procedure for specifying a funding policy and the allocation of responsibilities with respect thereto. In addition, each plan is to specify the procedure for amending the plan." Id. The final Conference Report also provides that "each plan . . . is to provide a procedure for amendments and for identifying who can amend the plan." H.R. Conf. Rep. No. 1280 *supra*, at 298; S. Conf. Rep. No. 1090, 93rd Cong., 2d Sess. 298 (1974). Congress thus very clearly rejected the common law approach to amendments now advanced by petitioner.

ciple was omitted deliberately from the statute". *Id.* In *Mertens* v. *Hewitt Associates*, 113 S.Ct. 2063, 2067, 124 L.Ed.2d 161 (1993), this Court endorsed the decision in *Nieto* v. *Ecker*, 845 F.2d 868 (9th Cir. 1988) and *Useden* rejecting attempts to incorporate into ERISA a right of action against non-fiduciaries who participate in breaches of fiduciary duty. This Court should similarly reject the *Biggers'* rule or any other interpretation of ERISA which incorporates into ERISA a common law standard of trust amendment which Congress rejected by the plain language of the statute. *Cf.. Central Bank of Denver, N.A.* v. *First International Bank of Denver, N.A.*, 114 S.Ct. 1439, 1447, 128 L.Ed.2d 119 (1994) (construing *Mertens* as holding that common law remedies under pre-ERISA trust law are not to be inferred into the statute if no comparable duty is set forth in ERISA).

D. The Existence of A Potential Equitable Remedy Should Not Preclude the Enforcement of the Plan's Written Terms

The Solicitor General places great store in the existence of an equitable remedy to force plans to comply with Section 402(b)(3) by adopting a proper amendment procedure in his argument that the remedy awarded respondents by the Third Circuit is inappropriate. Of course, the relief available under ERISA is not limited to equitable remedies. Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), entitles each participant "to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan" in addition to the equitable relief cited by petitioner and the Solicitor General.

However, the Solicitor General goes further and argues that the right of affected parties to compel compliance with the law removes the perverse incentive to forgo adoption of an amendment procedure. This argument ignores the reality that neither a plan participant nor a plan administrator will seek

that recourse; the former because he or she will not become aware that an amendment has been illegally adopted until after it has been applied, when the knowledge that a remedy is available to force the plan to have a proper procedure in the future would be cold comfort; the latter because a plan administrator generally is an employee of the plan sponsor and has no incentive to commence a suit to compel that sponsor to provide an amendment procedure.

IV. THE THIRD CIRCUIT HAS FASHIONED AN ELEGANT SOLUTION TO THE STATUTORY AND PRACTICAL ISSUES POSED

By failing to comply with Section 402(b)(3) by including an amendment procedure, petitioner and other plan sponsors might have rendered their benefit plans unamendable. *See, e.g., Deibler* v. *Local Union 23*, 973 F.2d 206, 210 n. 7 (3rd Cir. 1992); *Frank* v. *Colt Industries Inc.*, 910 F.2d 90 (3rd Cir. 1990); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 n. 9 (3rd Cir. 1990). However, the Third Circuit avoided that result by allowing a plan sponsor's decision making authority, here petitioner's board of directors, to restate and adopt the plan so as to include an amendment procedure. Pet. App. 11a.

This approach is consistent with the common law of trusts which resolves issues concerning the extent or method of a settlor's authority to revoke a trust by allowing the settlor first to modify the trust "by the insertion of a power to revoke and then exercising that power." G. Bogert & G. Bogert, *Law of Trusts and Trustees*, § 993, at 237-238 (rev. 2d ed. 1983). The two step solution is thus supported by common law precedent and not forbidden by express ERISA language. It elegantly resolves the divergent interests of participant, sponsor and fiduciary.[22]

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[22] The Third Circuit also recognized that amendments which increase benefits stand on a wholly different conceptual footing than amendments which decrease benefits. It is appropriate to hold plan spon-

CONCLUSION

The judgment of the court of appeals should be affirmed in all respects.

Respectfully submitted,

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sors to a more exacting standard for amendments which are solely in the interest of the plan sponsor and decrease benefits for a class of participants.